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16 NETOPIA, INC., ALAN B. LEFKOF, AND DAVID A KADISH

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN JOSE DIVISION

20 IN RE NETOPIA, INC. SECURITIES
21 LITIGATION

22) Case No.: C 04-3364 RMW
23) And Related Cases
24)
25) **[PROPOSED] ORDER**
26) **REGARDING CONFIDENTIALITY**

27 This Document Relates to: All Actions

28) Judge: Ronald M. Whyte
29) Courtroom: 6, Fourth Floor
30)
31)
32)
33)

1 Disclosure and discovery activity in these consolidated actions are likely to involve
 2 production of confidential, proprietary, or private information for which special protection
 3 from public disclosure and from use for any purpose other than prosecuting this litigation
 4 would be warranted. Accordingly, the parties hereby stipulate to and petition the Court to
 5 enter the following Protective Order.

6 **1. DEFINITIONS**

7 1.1 Party: any party to this action, including all of its officers, directors,
 8 employees, consultants, retained experts, and outside counsel (and their support staff).

9 1.2 Disclosure or Discovery Material: all items or information, regardless of the
 10 medium or manner generated, stored, or maintained (including, among other things,
 11 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
 12 responses to discovery in this matter.

13 1.3 “Confidential” Information or Items: Disclosure or Discovery Material that is
 14 non-public and that a Party in good faith believes must be held confidential to protect
 15 personal privacy interests or proprietary commercial or business information, including
 16 trade secrets.

17 1.4 Receiving Party: a Party that receives Disclosure or Discovery Material from
 18 a Producing Party.

19 1.5 Producing Party: a Party or non-party that produces Disclosure or Discovery
 20 Material in this action.

21 1.6 Designating Party: a Party or non-party that designates information or items
 22 that it produces in disclosures or in responses to discovery as “Confidential.”

23 1.7 Protected Material: any Disclosure or Discovery Material that is designated
 24 as “Confidential.”

25 1.8 Outside Counsel: attorneys who are not employees of a Party but who are
 26 retained to represent or advise a Party in this action.

27 1.9 In-house Counsel: attorneys who are employees of a Party.

28

1 1.10 Counsel (without qualifier): Outside Counsel and In-house Counsel (as well
 2 as their support staffs).

3 1.11 Expert: a person with specialized knowledge or experience in a matter
 4 pertinent to the litigation who has been retained by a Party or its counsel to serve as an
 5 expert witness or as a consultant in this action and who is not a past or a current employee
 6 of a Party or of a competitor of a Party's and who, at the time of retention, is not anticipated
 7 to become an employee of a Party or a competitor of a Party's. This definition includes a
 8 professional jury or trial consultant retained in connection with this litigation.

9 1.12 Professional Vendors: persons or entities that provide litigation support
 10 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations,
 11 organizing, storing, retrieving data in any form or medium, etc.) and their employees and
 12 subcontractors.

13 2. SCOPE

14 The protections conferred by this Stipulation and Order cover not only Protected
 15 Material (as defined above), but also any information copied or extracted therefrom, as well
 16 as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations,
 17 or presentations by parties or counsel to or in court or in other settings that might reveal
 18 Protected Material.

19 3. DURATION

20 Even after the termination of this litigation, the confidentiality obligations imposed
 21 by this Order shall remain in effect until a Designating Party agrees otherwise in writing or
 22 a court order otherwise directs.

23 4. DESIGNATING PROTECTED MATERIAL

24 4.1 Marking of Protected Material (other than deposition transcripts).

25 Any Party to this litigation, or non-party who produces Disclosure or Discovery
 26 Material, shall have the right to designate as "CONFIDENTIAL" any Protected Material it
 27 produces. All Protected Material shall bear a legend on each page stating that the material
 28 is "CONFIDENTIAL." In order to speed the process of producing large volumes of

1 Protected Material, multi-page documents in which Protected Material is pervasive may be
 2 marked "CONFIDENTIAL" throughout, with the understanding that portions of those
 3 documents not containing Protected Material can be de-designated through the meet-and-
 4 confer process of Paragraph 5.2. Where a computer disk has been marked as Protected
 5 Material, and the files on it are not individually Bates-numbered or identified as Protected
 6 Material, all files contained on the disk shall be considered Protected Material.

7 A Party or non-party that makes original documents or materials available for
 8 inspection need not designate them for protection until after the inspecting Party has
 9 indicated which material it would like copied and produced. During the inspection and
 10 before the designation, all of the material made available for inspection shall be deemed
 11 "CONFIDENTIAL." After the inspecting Party has identified the documents it wants
 12 copied and produced, the Producing Party must determine which documents, or portions
 13 thereof, qualify for protection under this Order, then, before producing the specified
 14 documents, the Producing Party must affix the "CONFIDENTIAL" legend at the bottom of
 15 each page that contains Protected Material.

16 Indiscriminate designations are prohibited. Designations that are shown to be clearly
 17 unjustified, or that have been made for an improper purpose (e.g., to unnecessarily
 18 encumber or retard the case development process, or to impose unnecessary expenses and
 19 burdens on other parties), expose the Designating Party to sanctions. If it comes to a Party's
 20 or a non-party's attention that Disclosure or Discovery Material does not qualify for
 21 protection at all, or does not qualify for the level of protection initially asserted, that Party
 22 or non-party shall promptly notify all other parties that it is withdrawing the mistaken
 23 designation.

24 4.2 Depositions. Deposition testimony may be classified as Protected Material at
 25 the deposition, or at any time during a review period of up to and including 30 days after
 26 receipt of the official transcript of such testimony by counsel for the Party whose
 27 information has been disclosed, or in the case of non-parties or others whose information
 28 has been disclosed, up to and including 30 days after the transcript is available for review,

1 whichever period is longer. Each deposition transcript in its entirety shall be treated as
 2 having been designated “CONFIDENTIAL” during the review period. Designations of
 3 Protected Material during the review period will be made in writing served upon all Parties
 4 and relevant non-parties.

5 Designations of Protected Material made during the deposition will be reasonably
 6 identified at the beginning of the deposition transcript when produced. Transcript pages
 7 containing Protected Material must be separately bound by the court reporter, who must
 8 affix to the bottom of each such page the legend “CONFIDENTIAL” as instructed by the
 9 Party or non party offering or sponsoring the witness or presenting the testimony.

10 4.3 Re-Designation: Inadvertent production of any Protected Material without a
 11 designation of confidentiality will not, standing alone, be deemed to waive a later claim as
 12 to its proper designation, nor will it prevent the Producing Party from designating said
 13 document or material “CONFIDENTIAL” at a later date. The Producing Party shall
 14 comply with Paragraph 4.1 when redesignating Disclosure or Discovery Material as
 15 Protected Material. Following any such redesignation, the Party receiving such material
 16 shall take reasonable steps to comply with the redesignation. However, the Receiving Party
 17 shall not be obligated to remove from the public record any Disclosure or Discovery
 18 Material that had been filed with the Court as part of the public record prior to the
 19 Producing Party’s redesignation of that material as Protected Material. The Producing Party
 20 may move to have any such material sealed.

21 5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

22 5.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
 23 confidentiality designation is necessary to avoid foreseeable substantial unfairness,
 24 unnecessary economic burdens, or a later significant disruption or delay of the litigation, a
 25 Party does not waive its right to challenge a confidentiality designation by electing not to
 26 mount a challenge promptly after the original designation is disclosed.

27 5.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
 28 Party’s confidentiality designation must do so in good faith and must begin the process by

1 conferring directly with counsel for the Designating Party. In conferring, the challenging
 2 Party must explain the basis for its belief that the confidentiality designation was not proper
 3 and must give the Designating Party an opportunity to review the Protected Material, to
 4 reconsider the circumstances, and, if no change in designation is offered, to explain the
 5 basis for the chosen designation. A challenging Party may proceed to the next stage of the
 6 challenge process only if it has engaged in this meet and confer process first.

7 5.3 Judicial Intervention. A Party that elects to press a challenge to a
 8 confidentiality designation after considering the justification offered by the Designating
 9 Party may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil
 10 Local Rule 79-5, if applicable) that identifies the challenged material and sets forth in detail
 11 the basis for the challenge. Each such motion must be accompanied by a competent
 12 declaration that affirms that the movant has complied with the meet and confer
 13 requirements imposed in the preceding paragraph and that sets forth with specificity the
 14 justification for the confidentiality designation that was given by the Designating Party in
 15 the meet and confer dialogue.

16 The burden of persuasion in any such challenge proceeding shall be on the
 17 Designating Party. Until the court rules on the challenge, all parties shall continue to afford
 18 the material in question the level of protection to which it is entitled under the Producing
 19 Party's designation.

20 6. ACCESS TO AND USE OF PROTECTED MATERIAL

21 6.1 Basic Principles. A Receiving Party may use Protected Material that is
 22 disclosed or produced by another Party or by a non-party in connection with this case only
 23 for prosecuting, defending, or attempting to settle this litigation. It may not use Protected
 24 Material for any other purpose. Such Protected Material maybe disclosed only to the
 25 categories of persons and under the conditions described in this Order. When the litigation
 26 has been terminated, a Receiving Party must comply with the provisions of Section 7, below
 27 (FINAL DISPOSITION).

28 Protected Material must be stored and maintained by a Receiving Party at a location

1 and in a secure manner that ensures that access is limited to the persons authorized under
2 this Order.

3 6.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
4 ordered by the Court or permitted in writing by the Designating Party, a Receiving Party
5 may disclose any information or item designated CONFIDENTIAL only to:

6 (a) the Receiving Party’s Outside Counsel of record in this action, as well
7 as employees of said Counsel to whom it is reasonably necessary to disclose the information
8 for this litigation;

9 (b) the officers, directors, and employees (including In-house Counsel) of
10 the Receiving Party to whom disclosure is reasonably necessary for this litigation and who
11 have signed the “Agreement to Be Bound by Protective Order” that is attached hereto as
12 Exhibit A;

13 (c) experts (as defined in this Order) of the Receiving Party to whom
14 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to
15 Be Bound by Protective Order” (Exhibit A);

16 (d) the Court and its personnel;

17 (e) court reporters, their staffs, and professional vendors to whom
18 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to
19 Be Bound by Protective Order” (Exhibit A);

20 (f) during their depositions, witnesses in the action to whom disclosure is
21 reasonably necessary and who have signed the “Agreement to Be Bound by Protective
22 Order” (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions
23 that reveal Protected Material must be separately bound by the court reporter and may not
24 be disclosed to anyone except as permitted under this Protective Order.

25 (g) the author of the document or the original source of the information.

26 6.3 Protected Material Subpoenaed Or Ordered Produced In Other Litigation. If a
27 Receiving Party is served with a subpoena or an order issued in other litigation that would
28 compel disclosure of any information or items designated in this action as

1 “CONFIDENTIAL,” the Receiving Party must so notify the Designating Party, in writing
 2 (by fax, if possible) immediately and in no event more than three court days after receiving
 3 the subpoena or order. Such notification must include a copy of the subpoena or court
 4 order. The Receiving Party also must immediately inform in writing the Party who caused
 5 the subpoena or order to issue in the other litigation that some or all the material covered by
 6 the subpoena or order is the subject of this Protective Order. In addition, the Receiving
 7 Party must deliver a copy of this Protective Order promptly to the Party in the other action
 8 that caused the subpoena or order to issue.

9 The purpose of imposing these duties is to alert the interested parties to the existence
 10 of this Protective Order and to afford the Designating Party in this case an opportunity to try
 11 to protect its confidentiality interests in the court from which the subpoena or order issued.
 12 The Designating Party shall bear the burdens and the expenses of seeking protection in that
 13 court of its CONFIDENTIAL material, and nothing in these provisions should be construed
 14 as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive
 15 from another court.

16 6.4 Unauthorized Disclosure Of Protected Material. If a Receiving Party learns
 17 that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in
 18 any circumstance not authorized under this Protective Order, the Receiving Party must
 19 immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b)
 20 use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or
 21 persons to whom unauthorized disclosures were made of all the terms of this Order, and (d)
 22 request such person or persons to execute the “Acknowledgment and Agreement to Be
 23 Bound” that is attached hereto as Exhibit A.

24 6.5 Using Protected Material in Court. Without written permission from the
 25 Designating Party or a court order secured after appropriate notice to all interested persons,
 26 a Party may not file in the public record in this action any Protected Material. A Party that
 27 seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5.

28 7. FINAL DISPOSITION

1 Unless otherwise ordered or agreed in writing by the Producing Party, within 60 days
2 after the final termination of this action, each Receiving Party must return all Protected
3 Material to the Producing Party. As used in this subdivision, "all Protected Material"
4 includes all copies, abstracts, compilations, summaries or any other form of reproducing or
5 capturing any of the Protected Material. With permission in writing from the Designating
6 Party, the Receiving Party may destroy some or all of the Protected Material instead of
7 returning it. Whether the Protected Material is returned or destroyed, the Receiving Party
8 must submit a written certification to the Producing Party (and, if not the same person or
9 entity, to the Designating Party) by the sixty day deadline that identifies (by category, where
10 appropriate) all the Protected Material that was returned or destroyed and that affirms that
11 the Receiving Party has not retained any copies, abstracts, compilations, summaries or other
12 forms of reproducing or capturing any of the Protected Material. Notwithstanding this
13 provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers,
14 transcripts, legal memoranda, correspondence or attorney work product, even if such
15 materials contain Protected Material. Any such archival copies that contain or constitute
16 Protected Material remain subject to this Protective Order as set forth in Section 3
17 (DURATION), above.

18 8. **RIGHT TO FURTHER RELIEF**

19 Nothing in this Order abridges the right of any person to seek its modification by the
20 Court in the future.

21 9. **RIGHT TO ASSERT OTHER OBJECTIONS**

22 By stipulating to the entry of this Protective Order no Party waives any right it
23 otherwise would have to object to disclosing or producing any information or item on any
24 ground not addressed in this Protective Order. Similarly, no Party waives any right to
25 object on any ground to use in evidence of any of the material covered by this Protective
26 Order.

27 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

28

1 DATED: September 11, 2006

2 _____
3 /s/ Seth R. Klein
4 Seth R. Klein*

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24 **Counsel for Defendants Netopia, Inc.,**
25 **Alan B. Lefkof and David A. Kadish**

26
27 *I, Michael E. Liftik, under whose ECF user name and password this document is
28 electronically filed, attest that the above-signed counsel have read and approved the
[PROPOSED] ORDER REGARDING CONFIDENTIALITY and consent to its filing in
this action.

29 PURSUANT TO STIPULATION, IT IS SO ORDERED.

30 DATED: September 12, 2006

31 
32 _____

33 PATRICIA V. TRUMBULL
34 UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety
and understand the Stipulated Protective Order that was issued by the United States District
Court for the Northern District of California on [date] in the case of _____
[insert formal name of the case and the number and initials assigned to it by the court]. I agree to comply with and to be bound by all the terms of this Stipulated Protective
Order and I understand and acknowledge that failure to so comply could expose me to
sanctions and punishment in the nature of contempt. I solemnly promise that I will not
disclose in any manner any information or item that is subject to this Stipulated Protective
Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name]
of _____ [print or type full
address and telephone number] as my California agent for service of process in connection
with this action or any proceedings related to enforcement of this Stipulated Protective
Order.

Date:

City and State where sworn and signed:

Printed name: _____
[printed name]

Signature: _____
[signature]